

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

BEFORE THE ADMINISTRATOR

In re:)
Jeff and Jane Mosel)
Rice Lake Dairy, LLC)
APL-014-07) **Decision**

This Decision is in response to an appeal (APL-014-07) of a denial of National Organic Program (NOP) certification to Rice Lake Dairy, LLC, by Midwest Organic Services Association (MOSA), for an operation deemed not in compliance with the Organic Foods Production Act of 1990 (Act)¹ and the regulations promulgated thereunder.²

BACKGROUND

The Act authorizes the Secretary to accredit certifying agents to certify crop, livestock, and handling operations to the National Organic Program and regulations (7 CFR Part 205). Certifying agents also initiate compliance actions to enforce program requirements. Denial of certification procedures are set forth in Section 205.405 of the NOP regulations. Persons subject to the Act who believe that they are adversely affected by a noncompliance decision of a certifying agent may appeal such decision to the Administrator pursuant to Sections 205.680 and 205.681 of the NOP regulations.

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

FINDINGS OF FACT

- 1) Midwest Organic Services Association (MOSA), Viroqua, Wisconsin, was granted USDA accreditation on April 29, 2002, the scope of which included organic crops, livestock, wild crops and handling certification.
- 2) Jeff and Jane Mosel operate Rice Lake Dairy, LLC, Gaylord, Minnesota.³ On April 2, 2007, the Mosels submitted an Initial Farm Plan Questionnaire and Livestock Plan Questionnaire in order to apply for organic certification from MOSA. As provided in the Questionnaires, Rice Lake Dairy was comprised of 284 acres for grain and forage production, and dairy livestock for milk, replacement dairy animals and organic cull slaughter.
- 3) In a letter dated March 30, 2007, Jeff and Jane Mosel addressed noncompliance issues that remained unresolved when a predecessor operation, Rice Lake Organic, surrendered its organic certification.⁴ The letter also informed MOSA that Rice Lake Dairy, LLC, was also seeking certification of the crops that were harvested in 2006. The Mosels stated, “Even though we were hoping to avoid selling 2006 crops for construction capital, we will likely need to sell some of our

³ Rice Lake Dairy, LLC filed as a limited liability company in Minnesota on October 23, 2006. Jeff and Jane Mosel are brother and sister.

⁴ Jeff Mosel and his wife, Tammy, operated Rice Lake Organic as a sole proprietorship which was certified by MOSA in 1998 for dairy and crop production. On January 26, 2005, Rice Lake Organic was suspended for failing to complete an updated organic production plan to continue certification. On June 8, 2005, AMS reinstated Rice Lake Organic’s organic certification based in part upon verification from MOSA that the entire operation was fully compliant.

On August 31, 2006, Rice Lake Organic was granted continuation of certification for crop production only. Rice Lake Organic did not submit a livestock plan in 2006.

On November 9, 2006, Stephen Walker, Certification Program Manager, MOSA, issued a Notice of Major Noncompliance and Proposed Suspension to Rice Lake Organic for repeated record insufficiencies, i.e. no field activity, equipment cleaning or sales records, no information or receipts for fertility and pest control inputs, and delayed organic plan updates. On December 28, 2006, Rice Lake Organic voluntarily surrendered its certification with outstanding noncompliances, which MOSA confirmed in a letter dated February 2, 2007. Mr. Walker stated, “It is our understanding that you are reorganizing your operation under a new partnership, and this reorganization is expected to address the noncompliance issues primarily related to recordkeeping. Subsequently, it is understood that the new LLC, Rice Lake Dairy, will seek organic certification. We will be happy to work with you as you seek organic certification for the new business.”

- 2006 organically grown corn and soybeans in order to finish financing the remaining construction and preparation prior to beginning milk production. We are hoping to begin milk production as soon as June, 2007.”⁵
- 4) On April 9, 2007, MOSA issued a Notification of Initial Review to Jeff and Jane Mosel to convey, in part, the following determinations: i) 2006 crops could not be considered for certification because the major noncompliances identified in November 2006 when the Rice Lake Organic operation was certified were not resolved by Rice Lake Organic prior to the business reorganization and formation of Rice Lake Dairy, LLC (See footnote #4, Notice of Major Noncompliance and Proposed Suspension); and ii) certification could not extend to 31 heifers from the Rice Lake Organic operation as these animals had been removed from organic production and could not regain organic status.⁶
- 5) On April 11, 2007, Bonnie Wideman, Director, MOSA wrote a letter to Jeff and Jane Mosel to investigate a complaint involving Jeff’s prior management of Rice Lake Organic. Ms. Wideman stated, “In March, before your current application for certification was received in our office and at a time I was unaware of any intentions you had of applying for certification, I received information about the organic management of your operation, Jeff, during the years 2005 and 2006, which I deemed worthy of investigation should a certification request again be made. Since you have requested certification from MOSA, the following concerns will need to be satisfactorily answered as part of our initial

⁵ According to the letter, Mr. Walker had advised Jeff and Jane Mosel to consider Rice Lake Dairy as having assumed management of the crops harvested in 2006 and explained that MOSA would consider in their determination, Rice Lake Dairy’s response to the noncompliance issues that were raised in the prior (August 31, 2006) inspection for the Rice Lake Organic operation.

⁶ The Notification of Initial Review identified a number of other issues to which the Mosels were expected to respond at the upcoming on-site inspection. These items included further information on field boundaries, crop inputs, seed variety identification; management of transitional and buffer crops, and non-organic livestock; provision of pasture for livestock; and, prevention of commingling the organic and non-organic feed.

- determination as to whether or not your operation can be considered for 2007 organic certification.” Ms. Wideman required that the Mosels present testimony or tangible evidence to satisfactorily address the following: “1) In February of 2005, you milked your cows at a farm owned by (b)(6) / (b)(7)(C), and at the time you took over the farm there is said to have been a bunker silo of conventional corn silage on the property. We have reason to believe that you fed that silage to your certified organic cattle....2) When you harvested organic crops where a buffer harvest needed to be taken because of adjoining conventional cropland, it has been questioned whether or not you actually separated the buffer harvests or if it was commingled with organic harvests....3) In 2006, you harvested both conventional and organic corn. It has been questioned whether or not you kept the harvest of conventional and organic corn separate....”
- 6) In an internal MOSA e-mail, dated April 26, 2007, Ms. Wideman described her telephone conversation that morning with Jeff Mosel regarding her April 11, 2007 letter to Jeff and Jane Mosel. Per Ms. Wideman’s e-mail, “Yes, there was conventional corn silage on the farm that Jeff was on in February of 2005. He said the owner was going to move it off the place but didn’t. Jeff said his back was against the wall (b)(6) / (b)(7)(C) his cows didn’t have enough to eat and were in bad shape and he fed it to his cows because he was short on money and feed. He said the only other feed he had at that time was purchased organic hay. He sold 44 cows to a conventional market in Albany to keep afloat...Jeff claims that other than this feeding of conventional corn during the most stressful conditions, his management has been all organic during his certification.” In regard to the 2 additional issues presented in the April 11, 2007

letter, Ms. Wideman reported that Mr. Mosel did not address the disposition of buffer zone harvests and stated that only organic corn was grown in 2006.

- 7) On May 7, 2007, MOSA issued a Notification of Noncompliance and Denial of Certification to Jeff and Jane Mosel citing Mr. Mosel's admission to Ms.

Wideman that he fed conventional corn silage to his certified dairy in 2005, in violation of §§ 205.237(a) and 205.236(b)(1).⁷ MOSA concluded the disclosure indicated that Mr. Mosel and Rice Lake Organic willfully made false statements and knowingly misrepresented products as organic. MOSA further determined that corrective action was not possible and, therefore, would not accept any application for certification from a responsibly connected party for 5 years from the date of the notification letter.⁸ Furthermore, MOSA commented, "There were other concerns noted in the letter you were sent from MOSA on April 11, 2007 in regard to other aspects of organic management. These have not been fully answered, but in light of your admission to feeding conventional corn to organic milk animals, we did not feel more information needed to be gathered and assessed in regard to the other issues." (See finding of fact #5).

- 8) On May 30, 2007, Jeff and Jane Mosel filed an appeal of the denial of certification. The Mosels acknowledged and explained the "noncompliance" that occurred in February 2005, stating, "At that time, and unfortunately when the operating loan was again delayed and still in process and the supply of feed for the cows was gone, and with no other apparent options – due to lack of money –

⁷ § 205.237(a) "The producer of an organic livestock operation must provide livestock with a total feed ration composed of agricultural products, including pasture and forage, that are organically produced and, if applicable, organically handled: Except, That, nonsynthetic substances and synthetic substances allowed under §205.603 may be used as feed additives and supplements."

§ 205.236(b) "The following are prohibited:...(1) Livestock or edible livestock products that are removed from an organic operation and subsequently managed on a nonorganic operation may be not sold, labeled or represented as organically produced."

⁸ MOSA explained that in their view, the 5 year time period is consistent with the period of ineligibility for revocation, to which an operator is subject for willful violation.

Jeff regrettably fed his cows some conventional corn silage which he purchased from a local farmer. Although we are not justifying this noncompliance, due to the stress and embarrassment of the action, Jeff did not disclose this noncompliance to MOSA at the time.” The Mosels described improved circumstances at the new Rice Lake Dairy operation stating, “Along with the formation of the new business in October 2006, we joined up with a funding institution that truly believes in the organic farming business...” (b)(6) / (b)(7)(C)

” The Mosels refuted MOSA’s determination that the “noncompliance” was not correctable, “Although we agree that the noncompliance cannot be un-done, we do not agree that it cannot be corrected. Rice Lake Dairy has absolutely no intention of committing any noncompliances today or in the future and jeopardizing the organic integrity of the new operation.” The Mosels contend that they also sold the cattle that had been fed conventional feed. Further, the Mosel’s argued that MOSA’s denial of certification was not in accordance with NOP regulations, specifically 205.405(d)(1) and 205.405(e).⁹ Their appeal challenged MOSA’s authority to assign a time frame to a denial of certification, refuted any prohibition on the eligibility to apply for certification from either MOSA or

⁹ § 205.405(d) “A notice of denial of certification must state the reason(s) for denial and the applicant’s right to: (1) Reapply for certification pursuant to §§ 205.402 and 205.405(e)....”

§ 205.405(e) “An applicant for certification who has received a written notification of noncompliance or a written notice of denial of certification may apply for certification again at any time with any certifying agent, in accordance with §§ 205.401 and 205.405(e). When such applicant submits a new application to a certifying agent other than the agent who issued the notification of noncompliance or notice of denial of certification, the applicant for certification must include a copy of the notification of noncompliance or notice of denial of certification and a description of the actions taken, with supporting documentation, to correct the noncompliances noted in the notification of noncompliance.”

another certifying agent, and found the notification letter misleading in its omission of the right to reapply for certification.¹⁰

DISCUSSION

Jeff and Jane Mosel established Rice Lake Dairy as a partnership comprised of crop and pasture land that was formerly managed in part by Mr. Mosel as the Rice Lake Organic operation which had been certified by MOSA. Rice Lake Organic surrendered its certification for crop production following receipt of a notice of proposed suspension that identified numerous recordkeeping deficiencies, consistent with the guidance from MOSA regarding certification for the new entity. Jeff and Jane Mosel sought to resolve those deficiencies and obtain certification for Rice Lake Dairy, including the corn and soybean crops in storage that were produced by Rice Lake Organic in 2006, prior to surrender of certification.

The certifying agent pre-empted the initial certification review of Rice Lake Dairy's application upon Mr. Mosel's admission to feeding conventional corn silage to dairy cows in February 2005, when Rice Lake Organic was suspended (See footnote #4) and his failure to disclose any discontinuity in organic management in the subsequent request for reinstatement. Following reinstatement of certification in June 2005, Rice Lake Organic resumed the shipment of milk represented as organic. The certifying agent

¹⁰ In the appeal, the Mosels reported that they had initiated the certification process with Global Organic Alliance (GOA), Bellefontaine, Ohio, following receipt of the denial of certification and requested permission to proceed with that application. On May 30, 2007, Shannon Nally, AMS Compliance Officer, affirmed that MOSA's determination did not restrict the Mosel's eligibility to submit an application to other certifying agents stating, "GOA may continue to process your application for certification...If these appeal proceedings conclude with an adverse decision, a certifying agent would be expected to take action, with regard to any active certifications, as necessary to align with the Administrator's ruling." GOA granted organic certification for crop production to Rice Lake Dairy on August 20, 2007. The Mosels informed GOA that the operation would not be ready for milk production before the summer of 2008, and therefore did not request certification for livestock. GOA did not grant certification for the 2006 crop and Rice Lake Dairy has appealed that the partial denial of certification in a separate proceeding, APL-022-07.

determined that Mr. Mosel had committed a willful violation of the NOP regulations and that corrective action was not possible. On that basis, the certifying agent denied initial certification to Rice Lake Dairy and further refused to accept an application for certification for a 5 year period from any applicant to which Jeff Mosel would be responsibly connected.

The impact of a 5 year denial of initial certification and refusal to accept an application for certification is analogous to a revocation. The NOP regulations, however, authorize suspension and revocation as the only legitimate means to rescind and withhold the eligibility of a person or operation to receive certification. A loss of eligibility would impede the progression towards compliance or be a disincentive to implement corrective action and is not an intended consequence of a denial of certification. Generally, a denial of certification does not have a sustained adverse effect, nor restrict an operation from continuing to pursue certification immediately following its issuance except, for instance, where there has been an application of a prohibited substance. Pursuant to section 205.405(e) “An applicant for certification who has received a written notification of noncompliance or a written notice of denial of certification may apply for certification again at any time with any certifying agent, in accordance with §§ 205.401 and 205.405(e). . . .”

Pursuant to sections 205.501(a)(19) and 205.402 (a)(2) of the NOP regulations, a certifying agent must certify, within its scope of accreditation, the qualified applicants which appear to comply or may be able to comply with the NOP regulations (emphasis added). Thus, the NOP regulations intend that a certifying agent evaluate an applicant for certification based upon the organic system plan and the observed ability of the operation, per on-site inspection, to successfully implement the organic system plan. It is improper

to use a denial of certification as a means for retroactive sanction in the absence of any tangible effect of a prior violation or noncompliance. Furthermore, mere speculation of future noncompliance is an inadequate justification for a denial of certification.

When a noncompliance is uncorrectable, in that the consequences are irreversible, measures to prevent further recurrence may suffice as corrective action to relieve from or mitigate a sanction. In this case, the outcome of the certification review process hinged upon a finding of a past violation and was prematurely terminated prior to an assessment of whether the operation had implemented adequate corrective or preventive measures. The appellants claimed to have secured sufficient resources to avert the financial constraints that precipitated the prior violation. The record further indicated that Rice Lake Dairy has attended to the noncompliances cited in regards to the Rice Lake Organic operation, specifically the gaps in recordkeeping and documentation.

The status of any livestock which had been certified under Rice Lake Organic is tangential to this appeal, but warrants clarification. The NOP regulations, section 205.235(b)(1), prohibit the recertification of any livestock or edible livestock products when an animal that was under organic management is subsequently maintained on a noncertified operation.

CONCLUSIONS

An applicant for organic certification, that is not restricted from applying for certification by an active suspension or revocation, may not be denied certification as a punitive sanction for a past violation when the operation otherwise appears capable of complying with the NOP regulations. I find that the prior violation of the NOP regulations is not a valid determinant of the present request for certification and that the appellants may request to resume the certification review process.

DECISION

The appeal is sustained.

Done at Washington, D.C., on this _16th_
day of __November_____, 2007.

/s/

Lloyd C. Day
AMS Administrator